Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS W-02-248 OF 1994 AND W-02-249 OF 1994
GOPAL SRI RAM, NH CHAN AND MOKHTAR SIDIN JJCA
30 APRIL 1997

***Tort** — Applicable law — Locus standi — Whether wife has capacity to sue husband for tort of negligence — Married Women Act 1957 s 9(2)*

***Tort** — Vicarious liability — Road accident — Vehicle driven by person other than owner — Whether owner of vehicle vicariously liable — Test applicable*

***Tort** — Negligence — Road accident — Apportionment of liability — Whether appellate court should interfere with apportionment of liability by trial judge*

The second plaintiff was riding pillion on a motorcycle of which the first plaintiff was the rider when a collision occurred between their motorcycle and a motor car owned by the second defendant and driven by the first defendant who was, at the material time, the husband of the second plaintiff. The plaintiffs brought an action claiming that the accident had been caused by the negligence of the first defendant. They also sought to make the second defendant vicariously liable for the first defendant's negligence. The defendants, in answer to the second plaintiff's action, pleaded s 9(2) of the Married Women Act 1957 ('the Act') which, prior to its amendment in 1994, states that 'except for the protection or security of his or her property, no husband or wife shall be entitled to sue the other for a tort'. The judge held the subsection to be an absolute bar to the second plaintiff's claim against her husband, the first defendant. The judge also held both the first plaintiff and the first defendant equally to blame for the collision. The plaintiffs appealed ('the second appeal').

Further, the judge held that the second defendant was vicariously liable for the first defendant's negligence. The defendants appealed ('the first appeal') arguing that the formula applied by the judge was not in accordance with the relevant provisions of the Civil Law Act 1956 and asked that the award for loss of future earnings be reduced. The defendants suggested a multiplier of 11⅓ and a multiplicand of RM400. It was also argued that the evidence demonstrated that the facts of the present case did not admit the operation of the vicarious liability doctrine.

Held, allowing the first appeal and dismissing the second appeal:

(1) The language of s 9(2) of the Act ought to receive an interpretation which is plain on its face. It was beyond argument that the second plaintiff's claim in her action was based on the tort of negligence. The learned judge was therefore entirely right in dismissing her claim against her husband as well as against the second defendant (see p 779C–E); *Mohamed Habibullah v Faridah bte Dato Talib* [1992] 2 MLJ 793 followed.

(2) The authorities showed that the owner would be vicariously liable if he had authorized or requested the act or the driver was carrying out a task or duty delegated to him, or because he was in control of the driver's conduct. He was not liable just because he had given permission to use the car, and had an interest or concern in the purpose for which the car was being used. In this case, there was evidence of permission of use of car and nothing else. That, on the authorities, was quite insufficient. Therefore, the judge's finding that the second defendant was vicariously liable was set aside (see p 781E–G); *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 followed.

(3) A multiplier of 11⅓ and a multiplicand of RM400 as suggested by counsel for the defendants were entirely in keeping with the provisions of the Civil Law Act 1956. Thus, the award for loss of future earnings was reduced to the product of that multiplier and multiplicand (see pp 781G–H and 782A–B).

(4) As regards the challenge directed against the apportionment of liability, this was a pure question of fact based upon the credibility of the witnesses seen and heard by the judge. In accordance with settled principles, it was not proper for this court to intervene upon such matters. The court formed the same view in respect of the award made by the judge in respect of general damages for the injuries sustained by the first plaintiff (see p 781H–I).

[Bahasa Malaysia summary

Plaintif kedua sedang menunggang motosikal sebagai pembonceng dengan plaintif pertama sebagai penunggang apabila satu pelanggaran berlaku antara motosikal mereka dan sebuah kereta yang dimiliki oleh defendan kedua dan dipandu oleh defendan pertama yang merupakan suami plaintif kedua pada masa material. Plaintif-plaintif memulakan satu tindakan yang menuntut bahawa kemalangan itu disebabkan oleh kecuaian defendan pertama. Mereka juga ingin membuat defendan kedua bertanggungjawab secara vikarius untuk kecuaian defendan pertama. Defendan-defendan, sebagai menjawab kepada tindakan plaintif kedua, memplidkan s 9(2) Akta Perempuan Bersuami 1957 ('Akta tersebut'), sebelum pemindaan dalam tahun 1994, yang menyatakan bahawa, 'melainkan perlindungan atau keselamatan hartanya, tiada suami atau isteri harus berhak mendakwa satu sama lain untuk satu tort'. Hakim memutuskan subseksyen itu adalah halangan mutlak kepada tuntutan plaintif kedua terhadap suaminya, defendan pertama. Hakim juga mendapati kedua-dua plaintif pertama dan defendan sama-sama bersalah atas pelanggaran. Plaintif-plaintif merayu ('rayuan kedua').

Selanjutnya, hakim memutuskan bahawa defendan kedua adalah bertanggungjawab secara vikarius atas kecuaian defendan pertama. Defendan-defendan merayu ('rayuan pertama') dengan berhujah bahawa rumusan yang dipakai oleh hakim tidak menurut peruntukan

A relevan Akta Undang-Undang Sivil 1956 dan meminta supaya award untuk kehilangan mata pencarian depan dikurangkan. Defendan-defendan mencadangkan multiplier sebanyak 11⅓ dan multiplicand sejumlah RM400. Ia juga dihujahkan bahawa keterangan menunjukkan bahawa fakta-fakta kes ini tidak menerima operasi doktrin liabiliti vikarius.

B **Diputuskan,** membenarkan rayuan pertama dan menolak rayuan kedua:

(1) Bahasa s 9(2) Akta tersebut patut menerima tafsiran yang jelas pada zahirnya. Tidak dapat dipertikaikan bahawa tuntutan plaintif kedua dalam tindakannya adalah berdasarkan tort kecuaian. Dengan itu, hakim yang arif adalah betul pada keseluruhannya C dalam menolak tuntutannya terhadap si suami serta terhadap defendan kedua (lihat ms 779C–E); *Mohamed Habibullah v Faridah bte Dato Talib* [1992] 2 MLJ 793 diikut.

(2) Autoriti-autoriti menunjukkan bahawa pemunya bertanggungjawab secara vikarius jika dia telah membenarkan atau meminta tindak- D tanduk atau pemandu melakukan tugas yang diberikannya, atau kerana dia mengawal kelakuan pemandu. Dia tidak bertanggungjawab hanya kerana dia memberi kebenaran untuk menggunakan kereta itu, dan mempunyai kepentingan atau urusan dalam tujuan atas mana kereta digunakan. Dalam kes ini, terdapat keterangan atas kebenaran penggunaan kereta dan tidak lebih E daripada itu. Atas autoriti-autoriti, ini tidak mencukupi. Oleh yang demikian, pendapat hakim bahawa defendan kedua bertanggungjawab secara vikarius diketepikan (lihat ms 781E–G); *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 diikut.

F (3) Multiplier sebanyak 11⅓ dan multiplicand sejumlah RM400 seperti yang dicadangkan oleh peguam defendan-defendan mematuhi peruntukan Akta Undang-Undang Sivil 1956 dengan sepenuhnya. Maka, award untuk kehilangan mata pencarian depan dikurangkan kepada hasil multiplier dan multiplicand tersebut G (lihat ms 781G–H dan 782A–B).

(4) Berkenaan cabaran yang ditujukan terhadap pengagihan liabiliti, ini merupakan satu persoalan fakta semata-mata berdasarkan kebolehpercayaan saksi-saksi yang diperhatikan dan didengar oleh hakim. Menurut prinsip-prinsip mantap, adalah tidak wajar untuk mahkamah ini campur tangan dalam perkara sedemikian. H Mahkamah mempunyai pandangan yang sama mengenai award yang dibuat oleh hakim berkaitan dengan ganti rugi umum untuk kecederaan yang dialami oleh plaintif pertama (lihat ms 781H–I).]

Notes

I For cases on vicarious liability, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 974–1024.

For cases on apportionment of liability in road accident cases, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 628–638 and 664.

Cases referred to

Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119 (folld)
Mohamed Habibullah v Faridah bte Dato Talib [1992] 2 MLJ 793 (folld)

Legislation referred to

Civil Law Act 1956
Married Women Act 1957 s 9(2)

Appeal from: Civil Suit No S5–23–91 of 1990 (High Court, Kuala Lumpur)

Civil Appeal No W–02–248–94
Khoo Eng Chin (*Andrew Khoo* with him) (*Khoo & Sidhu*) for the appellants.
BS Sidhu (*Sharon Sidhu* with him) (*BS Sidhu & Co*) for the respondents.

Civil Appeal No W–02–249–94
BS Sidhu (*Sharon Sidhu* with him) (*BS Sidhu & Co*) for the appellants.
Khoo Eng Chin (*Andrew Khoo* with him) (*Khoo & Sidhu*) for the respondents.

Gopal Sri Ram JCA (delivering the judgment of the court): There are two appeals before us. They are Civil Appeal Nos W–02–248–94 ('the first appeal') and W–02–249–94 ('the second appeal'). Both arise from a decision of the High Court in a personal injury action. Because of the logical sequence of the arguments relevant to the issues before us, we will deal with the appeals in reverse order.

The second appeal is brought by Adnan bin Hj Mat Jidin and Normala bte Ismail who were plaintiffs in the court below. Irwan Wee bin Abdullah and Foong Siew Leng who were the defendants in the court below are respondents in the second appeal. In the first appeal, the roles are reversed, the appeal being that of the defendants. For convenience, we will refer to the parties as plaintiffs and defendants and in the order in which they appear in the title to the action.

The facts relevant to both appeals are fairly straightforward and may be shortly stated. On 11 October 1989, the second plaintiff was riding pillion on a motorcycle of which the first plaintiff was the rider. There was a collision between their motorcycle and a motor car owned by the second defendant and driven by the first defendant who was, at the material time, the husband of the second plaintiff. The plaintiffs brought an action claiming that the accident had been caused by the negligence of the first defendant. They also sought to make the second defendant vicariously liable for the first defendant's negligence.

The defendants, in answer to the second plaintiff's action, pleaded s 9(2) of the Married Women Act 1957 which, prior to its amendment in 1994, read as follows:

> 9 (2) Except for the protection or security of his or her property, no husband or wife shall be entitled to sue the other for a tort.

A The learned judge who tried the action held the subsection to be an absolute bar to the second plaintiff's claim against her husband, the first defendant. He dismissed her claim for that reason. This forms the subject matter of the second appeal.

Before us, En Sidhu of counsel for the plaintiffs sought to argue B around s 9(2). But the language of the section is so plain that it makes the point quite unarguable.

That the language of the subsection ought to receive an interpretation which is plain on its face is made clear by the decision of the (then) Supreme Court in *Mohamed Habibullah v Faridah bte Dato Talib* [1992] C 2 MLJ 793, where Harun Hashim SCJ (as he then was) said (at p 804):

> The cause of action in the present case is clearly a *tort*. If the allegations of assault and battery can be proved, this may be the subject of criminal proceedings against the defendant, but this fact stands independently from an action in tort. *As the plaintiff and defendant are husband and wife and the allegations of assault and battery constituting the tort are not related to the* D *protection or security of property, the plaintiff is barred by s 9(2) of the Married Women Ordinance from suing the defendant.* Section 9(2) therefore applies and the High Court is in error in deciding that it did not. (Emphasis added.)

It is beyond argument that the second plaintiff's claim in her action was based on the tort of negligence. In our judgment, the learned judge was E therefore entirely right in dismissing her claim against her husband as well as against the second defendant.

We now turn to deal with the claim of the first plaintiff which forms the subject matter of the first appeal. The learned judge held both the first plaintiff and the first defendant equally to blame for the collision. He also F held the second defendant to be vicariously answerable for the first defendant's negligence. He made an award of damages which included compensation for loss of future earnings. The second defendant complained that the formula applied by the learned judge was not in accordance with the relevant provisions of the Civil Law Act 1956 and asked that the figure be reduced.

G Encik Khoo Eng Chin of counsel for the defendants attacked the finding of the learned judge against the second defendant on the basis of vicarious liability. He drew our attention to passages in the evidence to demonstrate that the facts of the present case do not admit the operation of the vicarious liability doctrine. That doctrine, in so far as it applies to H agency relationships, was stated with such clarity by Raja Azlan Shah FJ (as he then was) in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 at p 121 that we find it necessary to quote in extenso from his judgment:

> Although there is some force in saying that the fact of ownership is a I valuable consideration in determining whether or not the driver is driving independently or for and on behalf of the owner, it would be surprising that that fact alone could saddle the owner with liability. It has never been the law that the owner of a car is responsible in law for damage done by the negligence of a person to whom the car is lent or whom he has permitted to use it. Singleton LJ said this in *Ormrod v Crosville Motor Services Ltd* [1953] 2 All ER 753 (at p 754):

'It has been said more than once that a driver of a motor car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to the use of a chattel is not proof of agency ... .'

Any other view would be tantamount to say that *Hewitt v Bonvin* [1940] 1 KB 188 was wrongly decided. And that case was approved by the Privy Council in *Rambarran v Gurrucharran* [1970] 1 All ER 749. In my view, the legal principle was correctly stated by MacKinnon LJ in *Hewitt v Bonvin* (at p 191):

'If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage, he must establish that in doing the act, B acted as the agent or servant of C. If he says that he was C's agent, he must further show that C authorized the act. If he can establish that B was the servant of C, the question of authority need not arise.'

Du Parcq LJ in that case put the matter in the following way (at p 194):

'The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time, he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership but on the delegation of a task or duty ... .'

The reasoning in *Ormrod*'s case is based on the same principle. Pearson LJ in *Norton v Canadian Pacific Steamships Ltd* [1961] 2 All ER 785 said (at p 790):

'The owner of a car, when he takes or sends it on a journey for his own purposes, owes a duty of care to other road users, and if any of them suffers damage from negligent driving of the car, whether by the owner himself or by an agent to whom he has delegated the driving, the owner is liable.'

Sachs LJ in *Vandyke v Fender* [1970] 2 All ER 335 said of *Ormrod*'s case (at p 342):

'Ever since the decision of this court in *Ormrod v Crosville Motor Services Ltd*, it has been considered clear that where the owner of the car has authorized a driver to drive a car, and has an interest in one of the objects of the particular journey, the driver is his agent when driving.'

From the above authorities, it can be said without fear of contradiction that the legal principle of vicarious liability for the negligent driving of a car by another person is the principle *qui facit per alium, facit per se.* I cannot put the matter better or more tersely than as I found it put by Lord Pearson in his speech in *Morgans v Launchbury* [1972] 2 All ER 606 [at pp 613–614]:

'If the car is being driven by a servant of the owner in the course of the employment or by an agent of the owner in the course of the agency, the owner is responsible for negligence in the driving. The making of the journey is a delegated duty or task undertaken by the servant or agent in pursuance of an order or instruction or request from the owner and for the purposes of the owner. For the creation of the agency relationship, it is not necessary that there should be a legally binding contract of agency, but it is necessary that there should be an instruction or request from the owner and an undertaking of the duty or task by the agent. Also, the fact that the journey is undertaken partly for the purposes of the agent as well as for the purposes of the owner does not

A negative the creation of the agency relationship: *Hewitt v Bonvin* [1940] 1 KB 188 at pp 194–195, *Ormrod v Crosville Motor Services Ltd* [1953] 1 All ER 711, *Hilton v Thomas Burton (Rhodes) Ltd* [1961] 1 All ER 74 at p 76, *Norton v Canadian Pacific Steamships Ltd* [1961] 2 All ER 785 at p 790 and *Klein v Caluori* [1971] 2 All ER 701 at p 702. I think there has to be an acceptance by the agent of a mandate from the principal B though neither the acceptance nor the mandate has to be formally expressed or legally binding.'

It can therefore be seen that the test of vicarious liability in such cases as the present is not the 'interest and concern' argument. The principle that the owner of a car is vicariously liable for the use of it by someone whom he has C permitted to use it if he has an interest or concern in the purposes for which it is being used, is not only unsatisfactory but unwarranted. Every person who permits another to use his car may be said to have an interest or concern in the car being carefully used and in most cases, to have an interest or concern in the safety of the driver, but it has never been the law that mere permission is sufficient to establish vicarious liability. A person who permits D another to use his car does not become the former's agent if, on his own volition, he uses it for the owner's benefit, eg a person using his brother's car with permission does not become the latter's agent because, remembering that the latter has a luggage at the shop, he uses the car to collect it. If the journey is at the owner's own request as in *Ormrod*'s case or where the owner asks his brother to bring the car to the railway station to meet him, then the driver can be said to do an act for the owner and acting as his E agent. *The owner is liable because he has authorized or requested the act or because the driver is carrying out a task or duty delegated to him, or because he is in control of the driver's conduct. He is not liable just because he has given permission to use the car, and has an interest or concern in the purpose for which the car is being used.* The phrase *qui facit per alium, facit per se* correctly expresses the principle governing vicarious liability. (Emphasis added.)

F We are in agreement with En Khoo's submission that the evidence in the present case falls short of the test propounded by Raja Azlan Shah FJ in the passage to which we have lent emphasis. Here, we have evidence of permission of user and nothing else. That, on the authorities, is quite insufficient.

G In respect of the complaint that the compensation awarded for loss of future earnings was excessive, En Khoo Eng Chin suggested a multiplier of 11⅓ and a multiplicand of RM400. We found this entirely in keeping with the provisions of the Civil Law Act 1956.

As regards the challenge directed against the apportionment of liability, H we formed the view that this was a pure question of fact based upon the credibility of the witnesses seen and heard by the learned judge. In accordance with settled principles, it is not proper for this court to intervene upon such matters. We formed the same view in respect of the award made by the learned judge in respect of general damages for the injuries sustained I by the first plaintiff.

For the reasons given, we made the following orders in respect of each appeal:

(1) The first appeal was allowed to the extent:

(a) that the learned judge's finding that the second defendant was vicariously liable was set aside; and

(b) that the award for loss of future earnings was reduced to the product of the multiplier and multiplicand earlier referred to.

Taking into account all the circumstances of the case, we made no order as to costs and directed the deposit paid into court be refunded to them.

(2) In respect of the second appeal, we dismissed the appeal of the first plaintiff against the apportionment of liability and quantum. In respect of the second plaintiff, we dismissed her appeal against the order of the trial judge denying her relief by reason of s 9(2) of the Married Women Act 1957. As in the first appeal, we made no order as to costs and directed that the deposit paid into court be refunded to the plaintiffs.

Order accordingly.

Reported by Jafisah Jaafar